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In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR N. MILLER, ALSO KNOWN AS VIC MILLER; JOHN J. HUMPHREY, ALSO KNOWN AS JOHN J. HUMPHREY, SR., ALSO KNOWN AS J. M. HUMPHREY; CHARLES J. MCCONNELL, ALSO KNOWN AS CHAS. J. MCCONNELL; ELMER JOHNSON AND HILMA JOHNSON, HIS WIFE; DAVID WILSON AGNEW; ALBERT ROUGE; AND FLORENCE VAN SANTEN

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 22, 1942, reversing a judgment of the United States District Court for the Northern District of California in eminent domain proceedings.

OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 466–476) is reported in 125 F. (2d) 75.

JURISDICTION

The judgment of the circuit court of appeals was entered January 22, 1942 (R. 477). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether just compensation includes increases in the value of the lands taken, resulting wholly from reauthorization of the project for which they were taken.

2. In a proceeding under the Declaration of Taking Act the court ordered paid to the landowner the monies deposited by the United States as the estimated value of the land. May the United States have judgment for restitution upon a jury finding that the lands were worth a lesser amount?

STATUTE INVOLVED

Section 1 of the Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421–1422, 40 U. S. C. sec. 258a, is printed in the Appendix (pp. 15–17, *infra*).

STATEMENT

On December 2, 1935, upon the recommendation of the Secretary of the Interior, the President approved construction of the Central Valley Project, a comprehensive program for the conservation, regulation, and utilization of the water resources of the Sacramento and San Joaquin rivers (R. 2–3, 237–238, 240).[1] The key unit of the project is a dam and power plant on the Sacramento river. In his report for the fiscal year ending June 30, 1937, the Secretary of the Interior reported (pp. 7–8) that Shasta had been selected as the site for this dam. The project was reauthorized by Congress in Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 844, 850.

Construction of the Shasta dam necessarily involved relocation of thirty miles of the line of the Central Pacific Railroad, for the reservoir would flood part of the existing right-of-way (R. 5–6,

[1] On April 6, 1934, prior to approval of the project by the President, the Chief of Engineers, United States Army, recommended that the Federal Government contribute $12,000,000 toward construction of the dam on the Sacramento River. Rivers and Harbors Com. Doc. No. 35, 73d Cong., 2d Sess., p. 5. The Act of August 30, 1935, c. 831, 49 Stat. 1028, 1038, authorized the expenditure of that amount. After the President's order approving the project the Act of June 22, 1936, c. 688, 49 Stat. 1570, 1622, appropriated $6,900,000 for the Central Valley Project. Section 2 of the Act of August 26, 1937, c. 832, 50 Stat. 844, 850, reauthorizing the project, also provided that the $12,000,000 should, when appropriated, be expended by the Secretary of the Interior rather than the Secretary of War.

157–158). As early as March 1936 the relocated right-of-way was marked on the lands belonging to respondents by stakes driven not more than 100 feet apart (R. 169, 175, 177, 184–185). An alternative route for the right-of-way was also staked out (R. 177, 179). In September 1937, at the request of respondents, one George L. Pearl subdivided their lands. His map showed the proposed railroad right-of-way (R. 224, 225, 226, 291, 292).

The amended complaint in eminent domain was filed on December 14, 1938 (R. 2–23). On the same day, pursuant to the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. secs. 258a–258e, a declaration of taking signed by the Acting Secretary of the Interior was filed, taking for relocation of the railroad right-of-way lands of respondents and certain other lands (R. 23–34). The declaration estimated $2,550 as just compensation to be paid for the tract belonging to respondents Miller, Humphrey, and McConnell, and that sum was deposited in court (R. 33–34). Upon the application of Miller, Humphrey, and McConnell (R. 69–72), the court directed its clerk to pay each of them a third of the deposit, or $850, on account of the just compensation which they were entitled to receive (R. 73–74).

At the trial respondents first sought to ask a witness whether he had made sales of real estate in the vicinity before December 14, 1938 (R. 231).

The testimony was excluded on the ground that evidence was inadmissible as to sales after August 26, 1937, when the Act reauthorizing the Central Valley Project was approved (R. 231–232). Thereafter, the witnesses were limited in their testimony as to the value of the land to the fair market value of the several tracts as of December 14, 1938, "leaving out of consideration any increase * * * in that value from and after August 26, 1937, due to the Central Valley Project." (R. 232–240, 248, 252, 274, 304, 317, 319, 339, 352, 367–369, 406–407.) By these rulings on evidence and in its charge (R. 428–429), the court excluded from consideration any increase in the value of the property resulting solely from passage of the Act of August 26, 1937.

The jury awarded respondents Miller, Humphrey, and McConnell $500 for their land and $100 severance damages (R. 112). Since the court had allowed them to withdraw the $2,550 deposited with the declaration of taking, or $1,950 more than just compensation, judgment was entered against each for $650, the excess amount which each had received (R. 124–125).

On appeal, the circuit court of appeals reversed the judgment in an opinion holding (1) that the respondents were entitled to compensation for the value of their lands on the date of the taking, including the increase in value resulting from the project for which the lands were taken and after

its approval, and (2) that the district court erred in ordering restitution of the excess amounts which respondents Miller, Humphrey, and McConnell had been paid.

REASONS FOR GRANTING THE WRIT

1. In holding that the just compensation included any increase in the value of the lands resulting solely from the Central Valley project for which they were taken, the court below decided an important question of federal law in a way which probably conflicts with *Shoemaker* v. *United States*, 147 U. S. 282.

In the *Shoemaker* case the facts were these: The Act of September 27, 1890, c. 1001, 26 Stat. 492, authorized a commission to select not more than 2,000 acres within designated geographical limits as a site for Rock Creek Park. Six and a half months later the commissioners filed a map showing the lands selected. In the condemnation proceedings, certain landowners objected to two instructions given to the appraisers by the court. The first directed the appraisers to (147 U. S. at 303)—

> receive no evidence tending to prove the prices actually paid on sales of property similar to that included in said park, and so situated as to adjoin it or to be within its immediate vicinity, when such sales have taken place since the passage of the act of Congress of the 27th of September 1890 * * * * * *

By the second instruction, the appraisers were told (147 U. S. at 304)—

> They are not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes, *nor can they consider the value given them by establishing the park* * * *. [Italics added.]

On review this Court approved both instructions, holding that appraisers are never allowed "to appraise the tracts of land proposed to be taken, by receiving evidence of conjectural or speculative values, based upon the anticipated effect of the proceedings under which the condemnation is had" (147 U. S. at 305).

In the instant case the district court followed that decision precisely. It excluded evidence of sales of similar property so situated as to benefit from the project, and made after the Act of Congress reauthorizing the project became law (R. 231). It required witnesses testifying as to the value of the lands on the date of the taking to exclude from their estimates any added value given to the lands by the project (R. 248, 252, 274, 304, 317, 319, 339, 352, 367–369, 406–407). In holding these rulings to be error, the court below failed to follow the *Shoemaker* case.

The court below attempted to distinguish the *Shoemaker* case on the ground that it decided only that lands outside the park were not sufficiently

"similar" to those within it for evidence of their selling prices to be admissible. This, the court said, was decisive, for in the present case the right-of-way was not finally located upon the lands taken until the date of the taking, whereas the lands in the *Shoemaker* case were within the limits of the park.

The factual distinction does not exist. As Judge Garrecht pointed out in his dissent (R. 475), the location of Rock Creek Park was not definitely fixed by the Act of Congress. The respondents here knew that in all probability their lands would be taken upon final authorization of the project, for a proposed right-of-way had been staked out over them.

Moreover, the distinction would make no difference. The opinion in the *Shoemaker* case squarely rejected the contention that the evidence of value might include "any supposed or speculative value given to the property taken by reason of the act of Congress creating the park project," and therefore did not decide only that lands outside the park were not "similar lands" (147 U. S. at 304–305). Neither does the citation of *Kerr* v. *South Park Commissioners*, 117 U. S. 379, in the *Shoemaker* case support the interpretation put upon the *Shoemaker* case by the court below. For while it is true that the *Kerr* case deals with evidence of sales of land outside of, but benefited by, a park which had been definitely located, this Court did not imply that if the location had not been definite the evidence would have been admis-

sible. Finally, we may point out that the definiteness of the site is immaterial to either of the two reasons upon which the rule of the *Shoemaker* case must rest. The first reason is that "the Government must not be required to pay for something it has itself made."[2] The second is that the lands taken can receive no benefit from the public work and hence do not in fact increase in value.[3]

The court below misconceived the Government's argument when it said that the Government sought to fix value as of the date of the Act rather than as of the time of the taking. In the district court the lands were evaluated as of the time of the taking both by the witnesses and by the jury in accordance with the charge; any rise in value between the two dates, such as a discovery of minerals, would have been taken into account if dissociated from the passage of the Act. The exclu-

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[2] Dissenting opinion of Judge Garrecht, R. 476. See *Seaboard Air Line Ry.* v. *United States*, 275 Fed. 77, 82–83 (E. D. S. C.); *San Diego Land Co.* v. *Neale*, 78 Cal. 63, 74; *Railroad Co.* v. *MacAdaras*, 257 Mo. 448, 463–464 (1914); *May* v. *Boston*, 158 Mass. 21, 30.

[3] See *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 385; *May* v. *Boston*, 158 Mass. 21; *Benton* v. *Brookline*, 151 Mass. 250; *Dorgan* v. *Boston*, 94 Mass. 223; *Egan* v. *City of Philadelphia*, 108 Pa. Super. Ct. 271; *Mowry* v. *Boston*, 173 Mass. 425; *Pierce County ex rel. Bellingham* v. *Duffy*, 104 Wash. 426; *Smith* v. *Commonwealth*, 210 Mass. 259; *United States* v. *Certain Lands, Town of Narragansett*, 180 Fed. 260 (C. C. R. I.); Orgel, *Valuation under Eminent Domain* (1936), 328–352.

sion of improper elements of value does not violate the rule that value must be determined as of the time of the taking, for as this Court stated in *Olson* v. *United States*, 292 U. S. 246, 261:

> Prices actually paid, and estimates or opinions based, upon the assumption that value to owners includes any such elements are not entitled to weight and should not be taken into account. * * *

The rule for which we contend has great importance at the present time. Frequently, military establishments are laid out covering a wide area, although only a part can be improved at the outset. It is convenient to the Government and fair to local communities to condemn the lands as they are needed rather than to take at once all the lands which will be required. The decision below would seriously interfere with that policy by forcing the United States to pay for increases in value accruing as a result of the growth of the establishment to lands whose taking was postponed even though it was known from the outset that the lands would probably be required.

2. In holding that the United States was not entitled to a judgment restoring the amounts received by respondents in excess of just compensation, the court below decided a novel question important in the administration of the Declaration of Taking Act. The opinion of the court gives no reason for its conclusion "That the Court

was without the jurisdiction to enter such judgment is so obvious that we so hold without further discussion" (R. 468).[4]

Analysis of the Declaration of Taking Act in the light of the traditional powers of courts indicates that this decision was probably wrong. Section 1 provides that upon filing a declaration of taking and depositing in court the amount of compensation "estimated" by the acquiring authority to be just, title to the land vests in the United States and the right to just compensation vests in the owners. The just compensation is to be "ascertained and awarded in said proceeding." Finally, section 1 declares:

> Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally

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[4] The case of *Los Angeles etc. Ry. Co.* v. *Rumpp*, 104 Cal. 20 (1894), cited by Judge Garrecht, concurring, sheds no light. That decision construed the provisions of the California Code dealing with a condemnor's right to possession prior to final judgment and held that, since under the California constitution a condemnor cannot take possession without first paying compensation, payment of an award estopped the condemnor from recovering any part of it, notwithstanding it should later be found too high. This consideration is not material to interpretation of a federal statute because the federal government can take possession without first paying just compensation. See e. g., *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S. 641, 658–659.

> awarded * * * shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

No provision is made for cases like the present, in which the sums paid on account exceed the just compensation.

There is no indication in these provisions that the United States is to be bound by the deposit of the officer or agency empowered to acquire the property; the amount deposited is only an estimate. If none of the deposit were paid to the landowner prior to the trial, surely it would not be paid over to him upon a finding that it was in excess of the just compensation he was entitled to receive. That the landowner has been paid the money cannot enlarge his rights. The established rule is that the courts will order the repayment of Government monies which the recipient *ex aequo et bono* ought to restore. Cf. *United States* v. *Wurts*, 303 U. S. 414. Hence, there can be no doubt that the United States can recover the excess amounts which the respondents received.

Upon the procedural question of whether a separate suit is required, the Declaration of Taking Act is also silent. But, as the Court pointed out in *Morgan* v. *United States*, 307 U. S. 183, 197, "What has been given or paid under the compulsion of a judgment the court will restore when its

judgment has been set aside and justice requires restitution." Cf. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 220; *Baltimore & O. R. Co.* v. *United States*, 279 U. S. 781, 786. The present case calls for the application of a similar rule. The excess amounts were paid to respondents pursuant to an order of the court. The verdict fixing just compensation established that the sums paid by the order were too high. No issue remained unsettled. In similar cases the state courts have given judgments for restitution instead of remitting the condemnors to unnecessary second proceedings.[8]

The practical importance of this question is great. The Act contemplates that the deposit will immediately be made available to the landowner for his use pending the determination of just compensation, a provision of vital importance to many condemnees who have lived on their land. The United States must pay 6% interest on the amount by which the award exceeds the deposit. For both reasons it is the practice of the acquiring authority to approximate as near as may be the actual value of the property. The result of the decision below will be to lead acquir-

[8] See e. g., *Carisch* v. *County Highway Committee*, 216 Wis. 375, 378 et seq., 257 N. W. 11 (1934); *St. Louis, K. & N. Ry. Co.* v. *Knapp-Stout & Co.*, 160 Mo. 396, 416–417, 61 S. W. 300 (1901); *Kentucky Hydro-Electric Co.* v. *Woodard*, 216 Ky. 618, 624–625, 287 S. W. 985 (1926); *Douglas* v. *Indianapolis Traction Co.*, 37 Ind. App. 332, 338–339, 76 N. E. 892 (1906), 2 Lewis, *Eminent Domain*, sec. 843, p. 1471 (3d ed. 1909).

ing officers to reduce their estimates, with the result that landowners will be required to wait longer for their money and the United States will be required to pay larger amounts of interest.

CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

APRIL 1942.

APPENDIX

Section 1 of the Act of February 26, 1931, c. 307, 46 Stat. 1421–1422, 40 U. S. C., sec. 258a, reads as follows:

> That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> (1) A statement of the authority under which and the public use for which said lands are taken.
>
> (2) A description of the lands taken sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said lands taken for said public use.
>
> (4) A plan showing the lands taken.
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the

amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon

which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

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